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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

NO. 422 MISC.

JAMES ARRINGTON, ALIAS
JIM ARRINGTON, ALIAS
Petitioner

VS.

STATE OF ALABAMA
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF ALABAMA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Alabama has been officially reported in_____Ala._____, 43 So. 2d (Adv. Op.) 644. Petitioner did not apply to the Alabama Supreme Court for a rehearing, although petitioner was entitled to such application under Rule 38 of the Rules of Practice in the Supreme Court. (Title 7, Code of Alabama 1940, Appendix.)

II

JURISDICTION

The jurisdiction of this Court is invoked under 62 Stat. 929 (28 U.S.C.A., §1257(3)).

III

STATEMENT OF THE CASE

Respondent does not consider it necessary to set forth a detailed statement of the case herein. The opinion of the Supreme Court of Alabama, as reported (43 So. 2d. 644), presents the relevant facts in considerable detail. This statement of the Alabama Supreme Court is hereby incorporated by reference.

IV

SUMMARY OF ARGUMENT

The argument on behalf of respondent is addressed to the sole question presented by the instant petition for writ of certiorari to the Supreme Court of Alabama. This question, as phrased by petitioner, assumes that efforts of court appointed counsel for petitioner were merely *pro forma*. Petitioner then presents the question of whether or not, assuming activities of court appointed counsel to have been *pro forma*, petitioner has been denied due process of law as required by the Fourteenth Amendment to the Federal Constitution because he has been denied the right to counsel in a capital case. Respondent will argue that this court has never held that the activities of court appointed counsel, during the trial of an indigent defendant in a capital case, will be scrutinized as to maximum effectiveness and overall advisability. Respondent will contend, as the Alabama Supreme Court in *Arrington v. State*, supra, has pointed out, that petitioner enjoyed the benefits of counsel from the time of first arraignment; and that this court should not weigh the advisability of the various trial tactics employed by court appointed counsel.

V

ARGUMENT

THE RIGHT OF AN ACCUSED IN A STATE COURT TO THE ASSISTANCE OF COUNSEL IN A

CAPITAL CASE AS AN INCIDENT OF A FAIR TRIAL DOES NOT REQUIRE THAT THE TRIAL TACTICS OF SUCH COUNSEL BE AS MERITORIOUS AND SKILLFUL AS POSSIBLE; NOR DOES THE RIGHT REQUIRE THIS COURT TO PASS JUDGMENT ON THE ADVISABILITY OF TACTICS EMPLOYED.

Petitioner seeks to have this Court review the tactics employed by his court appointed counsel in the conduct of his defense in the trial court. Petitioner has cited many instances which he states exhibit a failure of his court appointed counsel to conduct any more than a *pro forma* defense of petitioner. Respondent contends that neither this Court nor the Supreme Court of Alabama is required by the Federal Constitution to sit as a board of examiners and to grade, in effect, the defense attorney on his conduct of the case before the trial court. The Supreme Court of Alabama, in *Arrington v. State*, 43 So. 2d. 644, has stated that court appointed counsel was "an able, experienced, and conscientious attorneys of the Crenshaw County Bar." The Alabama Supreme Court, at 43 So. 2d. 644, has set forth reasons which may have necessitated the trial tactics which court appointed counsel adopted.

Respondent does not believe that the question of whether or not decisions on the right to counsel in the Federal courts are applicable is involved here. See dissenting opinion of Mr. Justice Douglas in *Bute v. Illinois*, 333 U. S. 640, 677 (1948); and cf. the dissenting opinion of Mr. Justice Black in *Adamson v. California*, 332 U. S. 46, 68, et seq. (1947). Since in the case at bar petitioner has been accused and convicted of a capital offense, he is entitled to counsel as a matter of due process, as required by the Constitution of the United States (*Powell v. Alabama*, 287 U. S. 45 (1932), and by the laws of Alabama (Title 15, Section 318, Code of Alabama 1940, as amended). There is no question that the accused was entitled to counsel in the case at bar. Respond-

ent, therefore, does not contend that the cases of this Court concerning tests for effectiveness of counsel in Federal criminal cases are inapposite.

Respondent contends that none of the cases cited by petitioner, as supporting his reasons for allowance of the writ of certiorari, authorizes this Court to pass judgment on the trial tactics of the court appointed counsel in the case at bar. The factual situation in each of these cases is distinguishable from the factual situation in the case at bar. *Avery v. Alabama*, 308 U. S. 444 (1940), is closest to this case. There, facts showing that defense counsel had only three days between arraignment and trial to prepare a defense to a murder indictment were held insufficient to warrant reversal because of denial of right to effective counsel. It is noteworthy that in the case at bar, ten days intervened between arraignment (at which time petitioner was represented by counsel) and trial. It is also noteworthy that in the *Avery* case (p. 450) this Court accepted statements in the opinion of the Supreme Court of Alabama as to the effectiveness of appointed counsel in conducting the defense. Compare the language of the Alabama Supreme Court in the case at bar as to the conduct of court appointed counsel.

Petitioner has attempted to bring this case within the bounds of *Powell v. Alabama*, 287 U. S. 45. However, the facts of the *Powell* case are clearly distinguishable from the facts in our case. There, the trial court first appointed "all the members of the bar." (p. 49.) In addition, there was an atmosphere of tense hostility throughout the trial. The defendants were young, ignorant, strangers-to-the-state, poor, and charged with a heinous crime. From the time of arraignment to the beginning of trial, defendants in the *Powell* case had no aid of counsel (p. 57). Furthermore, the court felt that all the members of the bar collectively "would not . . . . have been given that great appreciation of responsibility or impressed with that individual sense of duty

which should and naturally would accompany the appointment of a selected member of the bar, specifically named and assigned." (p. 56.) In the case at bar, a selected member of the bar was specifically named and assigned prior to arraignment. The general language of the *Powell* case concerning the effectiveness of appointed counsel must be considered in the light of the facts in that case. Petitioner cannot bring himself within the bounds of the *Powell* case.

In *Johnson v. Zerbst*, 304 U. S. 458 (1938), the defendants were tried, convicted and sentenced without assistance of counsel (p. 460). The *Johnson* case is, therefore, irrelevant here, even admitting that those cases concerning Federal criminal trials are in point in the case at bar.

Betts v. Brady, 316 U. S. 455 (1942), concerns a situation where the defendant, indicted for robbery, requested counsel on the ground of indigency and was refused by the trial court. This Court stated the issue in that case (p. 464):

> "The question we are now to decide is whether due process of law demands that in every criminal case, whatever the circumstances, a state must furnish counsel to an indigent defendant."

Betts v. Brady answered that question negatively. But even if, as some members of this Court contend (*Uveges v. Pennsylvania*, 335 U. S. 437, 440), the question should have been answered in the affirmative, an affirmative answer cannot give comfort to this petitioner. For in the case at bar, counsel was appointed by the court some ten days in advance of trial.

Similarly, in *Williams v. Kaiser*, 323 U. S. 471 (1945), and in *Tomkins v. Missouri*, 323 U. S. 485 (1945), the petitioners therein were tried, convicted and sen-

tenced without benefit of counsel. Therefore, these cases are inapposite.

In *House v. Mayo*, 324 U. S. 42 (1945), it appears that the petitioner therein had counsel of his own choice, but was not afforded a reasonable opportunity to consult with counsel, and pleaded guilty after his request for time to consult with counsel had been denied. Therefore, petitioner in that case was actually without counsel at crucial stages in the criminal proceedings against him. The *House* case is thus obviously distinguishable factually from the case at bar, where petitioner was represented by court appointed counsel throughout all stages of the present proceedings from arraignment to conviction and sentence.

Rice v. Olson, 324 U. S. 786 (1945), is not in point. There, an Indian pleaded guilty to a burglary charge without benefit of counsel.

DeMeerleer v. Michigan, 329 U. S. 663 (1947), again presents a peculiar factual situation, and we must assume that the holding and language of that case was directed to its facts. There, "a seventeen year old defendant, confronted by a serious and complicated criminal charge, (murder in the first degree), was hurried through unfamiliar criminal proceedings without a word being said in his defense. At no time was assistance of counsel offered or mentioned to him, nor was he apprised of the consequences of his plea (of guilty)." (p. 665.)

In *Wade v. Mayo*, 334 U. S. 672 (1948), the trial court refused a request by the petitioner for appointment of counsel. *Townsend v. Burke*, 334 U. S. 736 (1948), points out that presence of counsel might have prevented certain circumstances which this Court held deprived the petitioner therein of a fair trial. Again, there was total absence of counsel for the defendant.

The most recent pronouncements of this Court on the subject of right to counsel in the state courts have likewise been addressed to situations where the petitioner did not have benefit of counsel, was not informed of his right to counsel, nor offered counsel at any time between arrest and conviction. *Uveges v. Pennsylvania*, 335 U. S. 437 (1948); *Gibbs v. Burke*, 337 U. S. 773 (1949).

It is apparent that the cases of this Court discussed above on the subject of right to counsel in a capital case in the state courts (and in criminal cases generally in Federal Courts) have concerned situations where there was a total absence of counsel for the accused. (A possible exception is the *Powell* case, but there, appointment of all the members of the bar as counsel was considered tantamount to the appointment of no counsel at all.) It is obvious that these cases cannot control the case at bar, where counsel was appointed by the trial court at the first arraignment, and where the Supreme Court of Alabama has refused to disapprove the trial tactics employed by that counsel. In order to assume jurisdiction of this case by granting certiorari, this Court would have to decide that it should sit as an examiner of trial tactics employed by all court appointed counsel in criminal cases, where the Federal Constitution required benefit of counsel.

Petitioner has cited *Glasser v. United States*, 315 U. S. 60 (1942). Although this case arose in the Federal courts, since the case at bar is a capital case and counsel for accused is required, respondent will assume, *arguendo*, that the tests of effectiveness of appointment in the Federal courts are relevant here. However, in the *Glasser* case, this Court found that one lawyer was required by the Court to represent simultaneously the conflicting interests of two defendants. In the case at bar, if we accept the statements of the Alabama Supreme Court concerning appointed counsel, there was no evidence of such conflicting interests. Thus, the *Glasser* case should not be controlling here.

Nor is *Von Moltke v. Gillies*, 332 U. S. 708 (1947), of moment. That case decided merely that the petitioner had not understandingly waived benefit of counsel. Hence, neither the *Glasser* case nor the *Von Moltke* case furnishes ground for jurisdiction of this cause.

CONCLUSION

For the reasons set forth in this brief, respondent respectfully submits that certiorari should be denied.

Respectfully submitted,

A. A. CARMICHAEL,
Attorney General of Alabama,
Counsel for Respondent.

M. R. NACHMAN,
Assistant Attorney General,
Of Counsel on Brief.

CERTIFICATE

I hereby certify that I have forwarded a copy of the foregoing brief to Messrs. Williams, Carter & Marshall, 20 West Fortieth Street, New York, New York, attorneys for petitioner, on this the.....day of ....., 1950.

A. A. CARMICHAEL,
Attorney General of Alabama,
Counsel for Respondent.